IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.200 OF 2003

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University of Mumbai ...Petitioner

v/s.

M/s. Kulkarni & Company
and others. ...Respondents

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Mr.S.C. Naidu with Mr.Rui Rodrigues, Mr.A./L. Gore and Mr.Y.C. Naidu for the Petitioner.

Mr.D.A. Purandare i/b Ms. B.N. Dalal for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 19TH JANUARY,2005

P.C.:

1. By this Petition the Petitioner challenges the award filed under Section 30 of the Arbitration Act, 1940. The award is dated 20th August, 2002, which has been described as supplementary award by the learned arbitrator.

2. The facts that are necessary and relevant for deciding this petition are that the University of Bombay proposed construction of Academic Staff Quarters. For that purpose they appointed M/s.Gadre, Sabnis Associates as their architect. The tender submitted by the Respondent for the construction work was accepted. The construction of the building was completed on 15-8-1988. The Respondent/contractor submitted his final bill on 5-10-1988. Thereafter, the architect issued a final certificate as contemplated by the contract between the parties on 21-9-1989. Thereafter, the arbitrator was appointed on 15-7-1994. The arbitrator decided the dispute and

made the award for payment of money to the Respondent. That award was challenged before this court by the Petitioner by filing the Arbitration Petition No.441 of 1998. That petition was decided by order dated 7-1-2002. By that order the award was set aside and the proceedings were remanded back for denovo consideration and decision to the arbitrator in accordance with law. In the order it was noted by this Court that the arbitration clause is contained in clause 35 of the contract between the parties. That clause contemplates invocation of the arbitration clause within a period of 28 days from the date of final certificate issued by the architect. In the present case it appears that it is not done within a period of 28 days as contemplated by clause 35 of the contract. This point was specifically raised before the arbitrator. But the arbitrator has not decided the point. After the remand proceedings were taken up by the arbitrator and the arbitrator has made a fresh award which is challenged in the present petition.

3. So far as issue regarding invocation of the arbitration clause within the time mentioned in clause 35 of the contract is concerned, the

arbitrator overruled the objection raised by the Petitioner for two reasons. First reason is that by letter dated 12-10-1989 the Respondent complained about the final certificate dated 21-9-1989 and invoked the arbitration clause, therefore the invocation of the arbitration clause is within the period of 28 days from 12-10-1989. The second reason that is given is that the certificate dated 21-9-1989 cannot be termed as the final certificate within the meaning of the contract and therefore the reference is competent.

4. The learned Counsel appearing for the Petitioner submits that so far as the first reason given by the arbitrator is concerned, bare perusal of the letter dated 12-10-1989 of the Respondent shows that he has not even referred to the final certificate dated 21-9-1989 and that the subject matter of that letter was something entirely different and not the final certificate dated 21-9-1989. Secondly, it is submitted that the term final certificate has a definite meaning assigned to it by the terms of the contract and therefore the issue whether the final certificate dated 21-9-1989 can be described as final certificate or not, can be decided only with

reference to various terms in the contract. The arbitrator has, however, decided that issue without even referring to the terms in the contract. It is further submitted that even assuming that the final certificate issued by the architect has some mistakes in or that it is faulty, will not deprive it of its status as the final certificate within the meaning of the contract between the parties and therefore for the purpose of computing the period of limitation provided by clause 35, the certificate dated 21-9-1989 will have to be treated as the final certificate. It is further submitted that if according to the architect the certificate dated 21-9-1989 is not the final certificate, then the architect has not specified in his award as on what date the final certificate was issued. According clause 35 of the contract, a reference can be made to the arbitrator only after a final certificate is issued. Therefore, unless there is a final certificate issued, reference to arbitrator is not competent. According to the learned Counsel for the Petitioner, therefore for more than one reason the award made by the arbitrator is liable to be set aside.

5. On behalf of the Respondent, it was submitted that though the letter dated 12-10-1989 does not in fact refer to the final certificate dated 21-9-1989, it in fact invokes the arbitration clause and requests appointment of arbitrator. Therefore, the request for appointment of the arbitrator has in fact been made within a period of 28 days of the final certificate and therefore invocation of the arbitration clause is within the period specified by clause 35. It is further submitted that the correspondence between the parties and the conduct of the authorities of the University shows that after the final certificate dated 21-9-1989 was issued there was committee appointed for finding out the amount that is due to the contractor. Therefore, it is obvious that the certificate dated 21-9-1989 was not treated as final certificate by both the parties and therefore the finding recorded by the arbitrator cannot be faulted. It was lastly submitted on behalf of the Respondent that if this court finds that the issue is not properly decided by the arbitrator, the matter may be remanded back to the arbitrator for decision.

6. Now, if in the light of these rival submissions

the record of the case is perused, it becomes clear that for deciding the issue that falls for consideration it is necessary first to refer to clause 35 of the contract between the parties. Clause 35 reads as under:-

> 35. All disputes and differences of any kind whatever arising out of or in connection with the Contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the Architect who shall state his decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Architect with respect to any of the excepted matters shall be final and without appeal as stated in Clause 34 hereof. But if either the Employer or the Contractor be dissatisfied with the decision of the Architect on a matter, question or dispute of any kind (except any of the excepted matters or as

to the withholding by the Architect of any Certificate to which the Contractor may claim to be entitled, then and in any such case either party (the Employer or the Contractor) may within 28 days after receiving notice of such decision give a written notice to the other party though the Architect requiring that matter in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the Arbitration and final decision of an Arbitrator to be agreed upon and appointed by both the parties or, in case of disagreement as to the appointment of a single Arbitrator, to the appointment of two Arbitrators, one to be appointed by each party, which arbitrators shall, before taking upon themselves the burden of reference, appoint an Umpire.

The Arbitrator or Arbitrators, as the case may be, shall have power to open up, review

and revise any Certificate, opinion, decision, requisition or notice, save in regard to the excepted matters referred to in the preceding clause, and to determine all matters in dispute which shall be submitted to Arbitration and of which notice shall have been given as aforesaid.

The Arbitrator or Arbitrators, as the case may be, shall make his or their Award within one year (or such further extended time as may be decided by him or them as the case may be with the consent of the parties) from the date of entering on the reference. In case during the arbitration proceedings the parties mutually settle, compromise or compound their dispute or difference, the reference to arbitration and the appointment of the Arbitrator or Arbitrators, as the case may be, shall be deemed to stand withdrawn or terminated, with effect from the date on which the parties file a joint memorandum of settlement thereof, with the Arbitrator or the Arbitrators, as the case may be.

Upon every or any such reference, the cost of and incidental to the reference and Award respectively shall be in the discretion of the Arbitrator or Arbitrators, as the case may be, who may determine the amount thereof, or direct the same to be taxed as between attorney and client or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration within the meaning of the Indian Arbitration Act, 1940 or any statutory modification thereof. The Award of the Arbitrator or Arbitrators, as the case may be, shall be final and binding on the parties. It is agreed that the Contractor shall not delay the carrying out of the works by reason of any such matter, question or dispute being referred to arbitration, but shall proceed with the works with all due diligence and shall, until the decision of the Arbitrator or Arbitrators, as the case may be, is given,

> abide by the decision of the Architect and no Award of the Arbitrator or Arbitrators, as the case may be, shall relieve the contractor of his obligations to adhere strictly to the Architect's instructions with regard to the actual carrying out of the works. The Employer and the Contractor hereby also agree that arbitration under this clause shall be a condition precedent to any right of action under the Contract.

7. Perusal of the above quoted clause 35 shows that if any disputes arise between the parties, they are to be first referred to the named architect. The decision of the architect on the issue can be in the form of final certificate or it can be otherwise also. If either of the parties is not satisfied with the decision of the architect, then, within 28 days of the decision of the architect, the arbitration clause can be invoked. Perusal of clause 32 of the contract between the parties shows that the scheme is that during the continuation of the work the architect issues interim certificates and the contractor becomes entitled to payment by

installment. Clause 32, thereafter contemplates issuance of Virtual completion Certificate by the architect. Thereafter, clause 32 contemplates that the Architect shall issue final certificate and the contractor becomes entitled to final balance payment according to the final certificate issued by the Architect. Perusal of clause 34 shows that the final certificate issued by the Architect is to be treated as a decision of the Architect on the points contained in the final certificate. Therefore if these clauses 32, 34 and 35 are read together the scheme becomes apparent. The scheme is thus that after issuance of completion certificate the architect issues a final certificate. After issuance of final certificate by the architect, if the contractor is not satisfied with that, he has two options (i) he can raise the dispute before the architect, who can either decide the dispute or withhold his decision thereon or (ii) the contractor can invoke the arbitration clause and request reference of the dispute to the arbitrator. But if the contractor seeks reference to arbitrator on the basis of the final certificate, then he has to do it within 28 days of the final certificate. Thus, it is clear that for invocation of the arbitration

clause existence of one or other of the two things is necessary; (i) final certificate issued by the architect or (ii) a decision of the architect on a disputed question raised by the contractor or by the University after issuance of final certificate. Admitted position in the present case is that after completion certificate was issued on 15-8-1988, the contractor submitted final bill dated 5/10/1988 and the architect issued final certificate on 21-9-1989. The contractor within 28 days neither made a request for appointment of the arbitrator in relation to the final certificate nor did he raise a dispute before the architect. Perusal of clauses 32, 34 and 35 makes it clear that final certificate is that certificate which is issued by the architect and it is only that document which entitles the contractor to payment of the final balance amount. That final certificate which is issued by the architect is found to be defective or incorrect by the contractor or by the University will not deprive that certificate of the status of being final certificate so far as invocation of the arbitration clause is concerned. Therefore merely because on a complaint made by the contractor, the University appointed persons or authorities or committees to look into

the matter will not deprive the certificate issued by the architect after completion certificate of the status of final certificate for the purpose of the contract and for the purpose of invocation of the arbitration clause. Therefore, the arbitration clause had to be invoked within 28 days from 21/9/1989. The arbitrator has said that the letter dated 12/10/1989 of the contractor is within 28 days and therefore the arbitration clause is invoked within a period of 28 days from the final certificate. The observations of the arbitrator found in paragraph 11 reads as under:-

> In fact, Kulkarni complained about the above Bill dt.21-9-1989 and gave notice for invoking Arbitration vide Ex C-189 dated 12-10-1989 which is within limitation period specified in clause (35) of Tender......."

8. Now, perusal of the letter dated 12-10-1989 shows that letter is addressed to the architect. That letter is written with reference to letter No.GSA/1290-8/89 dated 4th August, 1989, and in the

body of the letter dated 12-10-1989 the final certificate dated 21-9-1989 is neither referred to nor relied upon. There is also no grievance made about it in the letter. Perusal of the letter dated 4th August, 1989 shows that this letter was addressed by the architect to the Respondent with reference to the letter of the Respondent dated 31-7-1989. This completely rules out the possibility of the letter dated 4-8-1989 having any connection with the final certificate dated 21-9-1989. Perusal of the letter dated 31-7-1989 shows that this is a letter addressed by the contractor to the architect, and this letter relates to the proposal of the engineer of the University to levy liquidated damages from the contractor for delay in completion of the work. It appears that the engineer of the University proposed that liquidated damages should be recovered from the contractor for delay in completion of the work and in that connection the contractor wrote to the University through the architect that liquidated damages should not be recovered from the contractor and that in any case the issue whether liquidated damages can be levied or not be referred to arbitrator under clause (35). The question whether

the liquidated damages are to be levied from the contractor or not cannot be the subject matter of the final certificate to be issued by the architect and therefore really speaking invocation of the arbitration clause in relation to the issue of liquidated damages was not possible in terms of recital of clause (35). Therefore, the letter dated 12/10/1989 by no stretch of imagination can be relied on to claim that the invocation of the arbitration clause was within a period of 28 days from the final certificate. It is nobody's case that the stipulation in clause (35) that invocation of the arbitration clause was within a period of 28 days from issuance of final certificate is not a mandatory requirement. It is clear that the invocation in this case is not within 28 days, therefore, the invocation of the arbitration clause is contrary to the provisions of clause 35 and therefore, the arbitrator will not get the jurisdiction to make any award pursuant to this defective invocation of the arbitration clause. The award made by the arbitrator is, therefore, liable to be set aside.

9. So far as request of the learned Counsel for the

Respondent for remand of the matter is concerned, in my opinion, as the material on record was available for consideration to the arbitrator, it will not be appropriate to remand the matter.

10. In the result, therefore, the present petition succeeds and is allowed. The award impugned in the petition is set aside. The Respondent is directed to pay costs of this petition, as incurred by the Petitioner, to the Petitioner.

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